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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-370

ARNOLD MARCUS, MARCUS DECORATING CO., INC., JERRY JEROME, JERED CONTRACTING CORP. and NATHAN WHEATMAN,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
Assistant District Attorneys
Of Counsel

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioners seek certiorari to review a judgment of the Court of Appeals of the State of New York, rendered June 8, 1972, which unanimously affirmed judgments of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, rendered February 10, 1972, which unanimously affirmed judgments of the Supreme Court of the State of New York, County of New

York, rendered May 24, 1968 and June 20, 1968, convicti
the petitioners, after a joint jury trial, of one count
conspiracy (N.Y. Former Penal Law §580), six counts
conspiracy to prevent competitive bidding on public co
tracts (N.Y. Former Penal Law §581-a), and bribery (N.
Former Penal Law §378).

Jerome was sentenced as a second felony offender
the bribery count to five to six years in prison, and his co
pany, Jered, was fined $20,000. Marcus and his compa
received a suspended sentence on all counts. Wheatm
was sentenced to a term of from two to four years in pris

Jurisdiction

The petition for certiorari was filed on or about Septe
ber 1, 1972. The petitioners invoke the Court's certior
jurisdiction pursuant to 28 U.S.C. §1257(3).

Statement of the Case

The Crime and Charges

A New York County Grand Jury filed a fifty-count
dictment charging Nathan Wheatman, then the head of
paint section of the New York City Housing Author
(hereinafter referred to as NYCHA), together with s
eral painting contractors doing business with NYCHA,
cluding Jerry Jerome, Samuel Spector, Arnold Marcus
their companies, other NYCHA officials, and a leader of
painters' union with the crimes of conspiracy and bribe

In essence the indictment charged that working togeth
the defendants had organized a scheme in which a group

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painting contractors banded together to prevent competitive bidding on contracts for painting at NYCHA projects. The group decided who would win the contracts advertised for public bidding, and the prices that would be bid. Jerry Jerome, Samuel Spector and Arnold Marcus were each, at one time, leaders of the group. They, their companies and four other individuals and their companies were named as defendants. To aid the effectiveness of the scheme, the group relied on Nathan Wheatman, and defendants Philip Lowell and John Nolan, all officials of the NYCHA. Wheatman and Lowell headed the paint sections of the NYCHA and provided inside information on Housing Authority estimates for bidding, expedited payments on requisitions and employed NYCHA inspectors who were to be lenient on group members and severe on non-group contractors. Wheatman and Lowell received as a bribe one percent of the gross amount of the contract from each bid winner. Nolan, the Chief Field Inspector, helped by constantly harassing those contractors who were not the recipients of the group's services.

The prosecution's main evidence at the ten-week trial was the testimony of two co-conspirators: Samuel Esrig and Jack Graham. Esrig had been leader of the group for a time and Graham had been a member. Their testimony was corroborated by bid estimate forms, prepared by Wheatman for the NYCHA's use in budgeting the jobs, which upon the execution of search warrants were found in the contractor's offices. The co-conspirators' testimony as to Wheatman was further corroborated by Wheatman's pre-arrest admission to a NYCHA security officer that he had made extra copies of the bid estimates and passed them along to certain contractors.

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The individual defendants, Wheatman, Jerome, Spector and Marcus, as well as the corporate defendants, Jered, Dunrite and Marcus, were each convicted of one count of conspiracy, one count of bribery, and six counts of conspiracy to prevent competitive bidding on public contracts; the jury could not agree on a verdict with respect to the defendants Rarback, Nolan, Fishbein and Barron. The cases of Goldman and Lowell had been severed, and Campbell pleaded guilty on the eve of trial.

Spector, Wheatman and Jerome received jail sentences. Spector's company and Jerome's company were fined. Marcus and his company received suspended sentences.

Proceedings on the First Appeal

On appeal to the Appellate Division the seven convicted defendants raised numerous issues under state law—that the evidence was insufficient to sustain the conviction, that the accomplice testimony was not sufficiently corroborated, that the indictment did not properly charge the conspiracy, that defendant Wheatman, a public official, could not be charged with bribery, that testimony of irrelevant assaults was introduced, that the statute of limitations barred the prosecution—and several constitutional claims—that Wheatman was not properly advised of his rights before making an admission, that the prosecution improperly called a witness knowing that he would claim his Fifth Amendment rights, that the prosecutor had an improper *ex parte* conference with the trial justice, and that there was an illegal search and seizure of the offices of the contractors. By order entered November 6, 1969, the Appellate Division, First Department, in a 3-2 decision, found

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the affidavit of an assistant district attorney, submitted in support of the warrants authorizing the search of the contractors' offices, defective on its face for failing to allege sufficient facts to establish probable cause. *People* v. *Wheatman*, 33 A.D.2d 65, 304 N.Y.S.2d 904 (1st Dept. 1969); Petition for Certiorari, Appendix B, at pp. A4-A14.

The Appellate Division, finding that the material seized upon the search was necessary under New York law to corroborate the accomplices at trial, did not, at that point, pass upon any of the other appellate claims. The court, therefore, reversed the conviction of the seven defendants upon the law, ordered a new trial, vacated the search warrant and suppressed the evidence.

Subsequently the People moved in the Appellate Division for reargument of the appeal with respect to the defendant Nathan Wheatman, on the ground that Wheatman, an NYCHA employee, lacked standing to challenge the search of the contractors' premises. The motion was granted [*People* v. *Wheatman*, 33 A.D. 2d 1107 (1st Dept. 1970)] and, thereafter, on March 26, 1970, the Appellate Division, in another 3-2 decision, modified the order of November 6, 1969 which reversed all seven convictions, to affirm the conviction of the defendant Wheatman alone. The opinions of the Appellate Division on the reargument appear at *People* v. *Wheatman*, 34 A.D.2d 3, 308 N.Y.S.2d 919 (1st Dept. 1970); and in the Petition for Certiorari, Appendix D, pp. A15-A19.

The People appealed to the Court of Appeals from the Appellate Division's reversal; Wheatman appealed from the Appellate Division's affirmance. On December 2, 1971, the New York Court of Appeals, on the People's

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appeal, unanimously reversed the order of the Appellate Division. In an opinion by Chief Judge FULD the court found that the district attorney's affidavit adequately set forth facts from which the magistrate could determine the reliability of the informants and the reliability of the information. Pursuant to New York law, the case was remanded for reconsideration by the Appellate Division; Wheatman's separate appeal was set for reargument. *People* v. *Wheatman,* 29 N.Y.2d 337, 327 N.Y.S.2d 643, 277 NE 2d 662 (1971). Petition for Certiorari, Appendix F, pp. A20-A28.

Proceedings on the Second Appeal

On remand, several questions under state law were argued and the Appellate Division unanimously affirmed. *People* v. *Wheatman,* 38 A.D.2d 801, 328 N.Y.S.2d 1016 (1st Dept. 1972). On June 8, 1972 the Court of Appeals, in another opinion by Chief Judge FULD, unanimously rejected each of the remaining questions raised by the defendants under state law or the constitution, without specifically passing on Wheatman's standing to challenge the searches, and affirmed all the convictions. *People* v. *Wheatman,* 31 N.Y.2d 12, 334 N.Y.S.2d 842 (1972).

Jerome sought a stay of his surrender in execution of the sentence. On July 13, 1972 the stay was denied by Mr. Justice MARSHALL. As of the submission of this response Jerome, residing in the State of Florida, has not surrendered to serve his sentence. On October 6, 1972 Wheatman began to serve his sentence.

Certiorari is being sought by five of the original seven convicted defendants—Spector and his company, Dunrite Painting Co. Inc., have not submitted petitions.

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Petitioners assert that the Court should grant review to determine the sufficiency of the affidavits underlying the search warrants, and Wheatman's standing to challenge a search of Jerome's office.

POINT

The assistant district attorney's affidavit in support of the application for a search warrant, based upon sworn testimony of admitted co-conspirators whom he had personally heard testify before the grand jury, established probable cause.

Grand juries impanelled by the Supreme Court, New York County, were investigating a conspiracy to rig bids on contracts for painting entered into between the New York City Housing Authority and various contractors, bid rigging, bribery of public officers, bribery of labor representatives, extortion, assault and grand larceny. During the course of the investigation, the assistant district attorney in charge of the presentation of the evidence before the grand jury made application before a Justice of the Supreme Court, New York County, for warrants authorizing the search of the offices of 14 named contracting companies, which included the corporate petitioners. The warrants directed the police to seize certain described "painting estimate forms." As a result of the issuance of the warrants, bid estimate forms were obtained from the offices of many of the painting contractors. At the ensuing trial, these estimate forms were offered as a part of the People's case to corroborate the testimony given by co-conspirators Esrig and Graham. The New York Court of Appeals applied the standards this Court set

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forth in *Aguilar* v. *Texas*, 378 U.S. 108 (1965) and *Spinelli* v. *United States*, 393 U.S. 410 (1969), and held that the affidavit presented in support of the warrants was sufficient. This decision was correct, for the affidavit, read in a common-sense fashion, amply complies with the rationale in those decisions, and the constitutional requirement that probable cause be established in the application for a warrant.

In his affidavit (reproduced in full in the Petition for Certiorari, pp. 4-8) the assistant district attorney stated that he had personally determined that the 14 named contractors, or their predecessors, had been doing business with the New York City Housing Authority, and that the addresses shown on the Housing Authority's records reflected the addresses listed for each of the contractors. The prosecutor also averred that he was present at proceedings before one of the two grand juries investigating bid rigging—the Fourth April 1965 Grand Jury. The prosecutor stated that the principals of twelve of the listed companies, including the defendants-respondents, had been subpoenaed to appear before the Grand Jury, each had refused to sign waivers of immunity, and, as a result, had had large painting contracts with the City of New York cancelled and had been disqualified from doing further business with the City. The affidavit then revealed that the prosecutor had "heard the sworn testimony of a number of witnesses • • • who had stated that they were parties to an agreement to rig bids at the City Housing Authority." The "sworn testimony before that [grand] jury" revealed that each of the contracting firms named in the affidavit was "a party to the agreement to rig bids." Sum-

marizing the sworn testimony, the prosecutor stated that the Housing Authority, for internal use, prepared certain "man-day estimates" on jobs that were open for bidding; he averred that sworn testimony further revealed that Jerry Jerome, one of the petitioners herein, the President of Jered Contracting Corp., another petitioner herein, obtained the bid estimate forms from the Housing Authority and passed them on to the other parties to the bid rigging agreement so that they could utilize the estimate information to submit false bids. Concluding that the "foregoing reliable information" and his personal knowledge established probable cause to believe that the estimate information was used by the conspirators and that the estimates might be found in the files of each of the contractors, the prosecutor requested the issuance of the warrants.

The New York Court of Appeals in *People* v. *Hendricks*, 25 N.Y.2d 129, 303 N.Y.S.2d 33, 250 N.E.2d 323 (1970), codified the standards which it found set forth in *Aguilar* and *Spinelli* and held that an affidavit, in order to support the issuance of a warrant, must show

> "(1) whether the informant is in fact reliable, and (2) whether the underlying circumstances as to how the informant came by his information demonstrates sufficient probability of credibility to allow the search of the premises or person in question." 25 N.Y.2d at 133; 303 N.Y.S.2d at 36; 250 N.E.2d at 325.

The affidavit in this case meets both prongs of the test.

Assuming that the unnamed witnesses before the grand jury are to be treated in the same manner as unnamed police informants, there seems to be little question that the first prong of the test has been met. The informants

in this case were shown to be reliable. Unlike the situation present in many of the search warrant cases decided by the appellate courts, there is no statement in the affidavit that the informants "were reliable." However, this case shows an even stronger basis for a finding of reliability than those cases in which the officer avers that the informant has been "reliable" in the past, or was a "prudent person." *Cf. United States* v. *Harris*, 402 U.S. 573, 579 (1971). For here the informants' information was given under oath while testifying before a grand jury. It should be axiomatic that sworn testimony is sufficient, *prima facie*, to warrant the belief that the witness is credible. The sufficiency of the oath as the primary form of insuring truthfulness has been well established at common law and is an integral part of the current judicial system. See, *e.g.*, 6 Wigmore, *Evidence*, §§813-17 (3rd Ed. 1940). The use of the oath impresses a witness "with the seriousness of the matter and guard[s] against the lie by the possibility of the penalty of perjury." *California* v. *Green*, 399 U.S. 149, 159 (1970). "The oath affirms the honesty of the statement and negatives the lie or imagination." *Spinelli* v. *United States*, *supra*, at 423 (WHITE, J. concurring); see also, *United States* v. *DeSisto*, 329 F.2d 929, 930 (2d Cir. 1964). Indeed, a perjury prosecution might result even if the witness appearing before the grand jury testified pursuant to a valid grant of transactional immunity. See N.Y. Former Code Crim. Proc. §619-c (2); N.Y. CPL §§50.10, 190.40; *People* v. *Tomasello*, 21 N.Y.2d 143, 287 N.Y.S.2d 1, 234 N.E.2d 190 (1968). The inherent credibility of testimony under oath has long been the root of the grand jury system. For, without more, a grand jury is authorized to indict for any crime on the basis of sworn testimony. So, too, the conviction of a defend-

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ant after trial usually rests exclusively upon sworn testimony. The Magistrate issuing the warrant, therefore, had a right to rely upon the testimony given by witnesses appearing before the grand jury and to presume them to be credible. See, *Skelton* v. *Superior Court*, 1 Cal. 3rd 144, 153-4, 81 Cal. Rptr. 613, 619, 460 P.2d 485, 490-1 (1969); see also Note, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971).

The informants here were also established as reliable because the information that they gave, implicating themselves in a conspiracy to rig bids submitted to the New York City Housing Authority, would be, as far as the affidavit revealed, against their penal interests, subjecting them to penalty for perjury, if false, and to prosecution for the conspiracy, if true. The informant's admission of participation in the crime has been held to be highly indicative of his credibility. See *e.g.*, *People* v. *Montague*, 19 N.Y.2d 121, 278 N.Y.S.2d 372, 224 N.E.2d 873 (1967), cert. denied 389 U.S. 862 (1967); *United States* v. *Viggiano*, 433 F.2d 716 (2d Cir. 1970), cert. denied 401 U.S. 938 (1970); *Louie* v. *United States*, 426 F.2d 1398, 1401 (9th Cir. 1970), cert. denied 400 U.S. 918 (1970); *United States* v. *Brown*, 455 F.2d 1201 (9th Cir. 1972); *cf. McCreary* v. *Sigler*, 406 F.2d 1264 (8th Cir. 1969), cert. denied 395 U.S. 984 (1969). As Mr. Chief Justice Burger noted in his opinion in *United States* v. *Harris*, *supra*,

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Ad-

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missions of crime, like admissions again proprietary interests, carry their own indicia of credibility—sufficient at least to support finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on a certain premise, itself and without more, implicated that property and furnished probable cause to search." See also *Skelton* v. *Superior Court, supra.*

So, too, here. For the co-conspirators' admissions, as recounted in the affidavit, were sufficiently detailed as to preclude the likelihood that they would falsely accuse themselves or others.

The self-implication in a bid-rigging conspiracy, even if made pursuant to a valid grant of transactional immunity, would under New York law also have the effect of depriving the confessing contractors of substantial pecuniary benefits, since they would be subject to disqualification as eligible bidders on future contracts with New York City. N.Y. Gen. Munic. Law §103. The conspirator, testifying before the Grand Jury, is also in effect subjecting himself to the subsequent burden of testifying at trial, to the difficulty in confronting the accomplices he has accused, and to the rigors of cross-examination. Further, the informants' participation in the illegal bid-rigging scheme would cast opprobrium upon them in the business community when the facts were eventually disclosed. Surely the "neutral and disinterested Magistrate" who passed upon the application for the warrant was justified in deciding,

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based upon the facts in the affidavit here, that the informants were credible witnesses when they testified before the grand jury.

The Magistrate could see from the affidavit that there was more than one co-conspirator testifying before the grand jury. Since each witness must, of necessity, have testified at a different time [see N.Y. Former Code Crim. Proc. §§255-7], the Magistrate could give their testimony added weight. Whatever details each conspirator revealed, the affidavit discloses that they confirmed, at the least, the existence of the conspiracy to rig bids submitted to the NYCHA. *Cf. People* v. *Fein*, 4 Cal. 3rd 747, 753, 94 Cal. Rptr. 607, 611, 484 P.2d 583, 587 (1971); *People* v. *Sheridan*, 2 Cal. App. 3d 483, 488, 82 Cal. Rptr. 695, 698 (1969).

The second prong of the *Spinelli* test is likewise clearly met. That is, the information in the affidavit was sufficient to allow the Magistrate to conclude that the informant came by this information in such a manner as to "demonstrate sufficient probability of credibility to allow the search of the premises * * * requested." *People* v. *Hendricks, supra*, 25 N.Y.2d at 133, 303 N.Y.S.2d at 36, 250 N.E. 2d at 325. The affidavit establishes the source of the informants' information. The information from the informants, testifying under oath before the grand jury, established that they were conspirators and were parties to an agreement to rig bids. The allegation in the affidavit that the sworn testimony "reveals that each of the named contracting firms has been identified as a party to the agreement to rig bids at the Housing Authority" means that the 14 named contractors were implicated by their

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co-conspirators. There can be no doubt that a co-conspirator has first-hand knowledge of who his confederates are, and that he can identify them. His testimony about them should give rise to probable cause. As Mr. Justice WHITE noted when concurring in *Spinelli*, "But if, for example, the informers' hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving the information should be held sufficient." 393 U.S. at 425.

"To paraphrase Mr. Justice Harlan [in *Spinelli*], a Magistrate, when confronted with such a circumstance, could reasonably infer that the informant had gained his information in a reliable way and not from an off-hand remark heard at the neighborhood bar." *People* v. *Munger*, 24 N.Y.2d 445, 451, 301 N.Y.S.2d 39, 43, 248 N.E.2d 882, 885 (1969). It follows, that the co-conspirators in their testimony before the grand jury had first-hand information of the workings of the bidding conspiracy. That is, the way that the bidders would determine the proper bids to submit would be known to parties to the conspiracy because of their own complicity and personal knowledge and not by third-hand hearsay or rumor. The detailed description naming the defendant-respondent Jerome as the conduit through which the man-day forms passed to the others could only have been obtained by personal knowledge of the co-conspirators. Moreover, since under then existing New York law "the Grand Jury can receive none but legal evidence" [N.Y. Former Code Crim. Proc. §249; see N.Y. CPL §§60.10, 190.30] the Magistrate could presume that the testimony was not hearsay. Indeed, it would be a hypertechnical reading of the affidavit which would lead one

to the conclusion that the information of the grand jury witnesses was obtained in anything but a first-hand manner.

As a matter of New York legislative policy,

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." N.Y. Former Code Crim. Proc. §399; see N.Y. CPL §60.22

However, a Magistrate should not be faulted for relying upon such testimony to ascertain if probable cause is established to search for the corroborative evidence. At trial an accomplice's testimony has to be corroborated in order to avoid the possibility that he may try to lessen the burden of guilt by falsely naming others to share it; that legislative purpose does not, however, apply during the course of a grand jury investigation. For, while testifying before the investigative body, prior to the filing of criminal charges against others, the accomplice is subject to a rigorous verification of his story. If the police acting on his information follow his advice and prove him to be a liar, he may be charged with perjury, and the innocent person falsely accused does not suffer the ignominy of indictment, arrest and trial. Indeed, the legislative purposes of the corroboration rule are aided by instances such as the case at bar—corroboration, needed to establish the informants' reliability sufficiently to meet the reasonable doubt standard at trial, was found by following up their testimony. Had their information proved to be false, the premises, searched as a result of the warrants, suffered less harm than the alleged co-conspirators, accused in an indictment, would suffer upon trial. Moreover, it should be remembered the appli-

cation for a search need not establish sufficient proof to warrant a conviction after trial. As Mr. Justice HARLAN, writing for the Court in *Spinelli*, 393 U.S. at 419, noted:

> "we do not retreat from the established propositions that only the probability, and not a *prima facie* showing of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial; *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967) * * *". See *United States* v. *Harris*, *supra* at 582-3.

Petitioners, relying on *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), suggest that certiorari should issue because "the inability to check the basis for the prosecutor's conclusions makes a mockery of the role of the magistrate and in effect allows the prosecutor to issue his own warrant" (petition, p. 9). Of course, unlike the *Coolidge* situation, an independent magistrate, not the prosecutor, issued the warrant. See *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). In any event, the petitioners' argument suggests that the affidavit of the assistant district attorney presenting the case to the grand jury had to be corroborated by the production of the text of the grand jury minutes. The suggestion is misguided. No such requirement, of the production of a police informant's statement in *haec verba*, is mandated by any cases decided by this Court. To suggest that the sworn statement of a prosecutor, who was known to the Magistrate as a well experienced trained "rackets" investigator [compare *United States* v. *Lewis*, 392 F.2d 377 (2d Cir. 1968)], which summarized evidence given in his presence before the grand jury, is less trustworthy than the affidavit of a police officer

recounting information from an unnamed "reliable informant" is unwarranted. The grand jury minutes, stenographically recorded, serve to permanently preserve the verbatim testimony of the "informants" in this case. The Magistrate issuing the warrant had ample right to rely upon the prosecutor's affidavit.

> "Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced." *State* v. *Burnett,* 42 N. J. 377, 388, 201 A.2d 39, 44 (WEINTRAUB, C.J.) (1964), quoted with approval in *McCray* v. *Illinois,* 386 U.S. 300, 307-8 (1967).

Were the prosecutor's sworn summary of the testimony incorrect, the defendants, who had access to the grand jury minutes during the course of the trial, after Esrig and Graham had testified, would no doubt have brought that fact to the attention of the courts below. No such claim has ever been made in this case. The prosecutor, in his affidavit, referred the Magistrate to the grand jury testimony, practically inviting him to verify the accuracy of his statements. The grand jury minutes, an immutable testament to the actual proceedings before the grand jury, were available for the issuing Magistrate's perusal. The absence of a check of the assistant district attorney's abstract of the testimony does not negate the existence of the information or the implied invitation to its verification. Nor does it constitute an improper delegation to the prosecutor of the Magistrate's function. The grand

jury minutes, which as the minutes of trial reveal contained the testimony of Esrig and Graham, two of the key co-conspirators, overwhelmingly demonstrate that probable cause would have been established had the minutes been made part of the application. The omission of the independent verification should not be held to vitiate the proper application for the warrant. The Magistrate issuing a warrant is not performing a merely ministerial act. He must use his discretion, independently of the prosecutor [*Cf. Coolidge* v. *New Hampshire, supra* at 449-53; *Shadwick* v. *City of Tampa, supra*], to determine the sufficiency of the application and of the verification he feels he needs. That determination, made in the exercise of sound judicial discretion, should not be overturned. *Cf. Jones* v. *United States,* 362 U.S. 257, 270-1 (1960); *Spinelli* v. *United States, supra* at 419.

Moreover, despite the petitioners' description of the affidavit, it is obvious that rather than reporting mere "conclusions" as to what witnesses said, the prosecutor was accurately summarizing the evidence which he personally heard. Indeed, the evidence to be summarized, contained in grand jury minutes which were several hundred pages long, was as complex as the facts uncovered and used in a tax investigation. The affidavit here is therefore analogous to the affidavit upheld in *Jaben* v. *United States,* 381 U.S. 214, 224 (1965), which established probable cause to believe that the defendant committed the crime of income tax evasion. As the Court noted:

> "Establishing of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from any individually unrevealing facts which are not susceptible

of a concise statement in a complaint. Furthermore, unlike narcotics informants, for example, whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us."

Once the Magistrate credited the information in the affidavit, probable cause was established. He could, then, based upon the information in the affidavit, rationally conclude that the bid estimate forms would be in the conspirators' files. The affidavit alleged

> "That the testimony further shows that the manday estimates prepared are solely for the internal use of the Housing Authority in preparing its various financial statements and budgets.
>
> * * *
>
> "That the sworn testimony before the grand jury shows that further that the parties to the bid rigging agreement were able to obtain the Housing Authority's estimate and that the parties utilized the information in the Housing Authority's estimate information to submit false bids to the Housing Authority.
>
> "That the sworn testimony of a number of witnesses stated that Jerry Jerome, who is a convicted felon and the President of Jered Contracting Corp., was the individual who obtained the Housing Authority estimate information and passed copies of that information on to the other parties to the agreement" (Petition for Certiorari, pp. 6-7).

Since there is reasonable probability that estimates used in the preparation of a bid will be found in the files of the

bidder, the Magistrate could properly have concluded that the forms to be seized would be found at the known addresses of the co-conspirators' offices. This case differs from the usual cases which involve possessory crimes or the fruits of a crime. For in those situations there often is not any reason for believing that the property to be seized is at a given place, unless someone stated that he has seen it there. Here, however, the documents to be seized would be found in the ordinary course of business in the offices of the co-conspirators who were, presumably, still participating in the continuing commercial conspiracy affecting their business. As Chief Judge FULD noted below,

> "Since the bid estimate information was essential to the preparation of the false bids and the carrying on of the conspiracy, it was entirely reasonable to conclude that the forms would be in the offices of the conspirators." *People* v. *Wheatman, supra,* 29 N.Y.2d at 346, 327 N.Y.S.2d at 649, 277 N.E.2d at 666.

"[I]n judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense." *Spinelli* v. *United States, supra,* at 419; *United States* v. *Ventresca,* 380 U.S. 102, 106-9 (1965). Using the proper standard, the issuing magistrate reasonably concluded that there was probable cause to believe that the incriminating papers could be found in the offices described in the warrants.

Since the warrants were properly issued, and the searches proper, there is no need to consider whether Wheatman had standing to challenge the warrants. In any event, Wheatman, a NYCHA employee, clearly lacks

standing to challenge the search of the contractors' offices. "Fourth Amendment rights are personal rights which • • • may not be vicariously asserted." *Alderman* v. *United States,* 394 U.S. 213, 216 (1969). Wheatman had alleged no property rights in the premises searched and was not a person who, having some rights in the premises, is the victim of the search. *Cf. Mancusi* v. *DeForte,* 392 U.S. 364 (1968). The only connection Wheatman had with the evidence seized is that it was introduced against him; that is not enough to give him standing. *Alderman* v. *United States, supra.*

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
LEWIS R. FRIEDMAN
Assistant District Attorneys
Of Counsel

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